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WAIVER OF TORT.

IF any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in assumpsit to recover the value of that which has been tortiously taken or used. The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and if he elect to sue in assumpsit, he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies.¹ With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. It is usual, however, to speak of waiver of tort only, for the reason that the remedy in tort is the older. The tort is, however, waived only in the sense that a party having a right to sue in tort or assumpsit will not, after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.² Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of *indebitatus assumpsit* when brought to enforce a right of action not resting on contract,³ much of the confusion in, and conflict of, decisions now existing would have been avoided. The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

Assuming a defendant to be a tortfeasor, in order that the doctrine of waiver of tort may apply the defendant must have unjustly

¹ *Cooper v. Cooper*, 147 Mass. 370; *Huffman v. Hughlett*, 11 Lea, 549.

² *Huffman v. Hughlett*, 11 Lea, 549.

³ *Louisiana v. Mayor, etc.*, 109 U. S. 285; *People v. Speir*, 77 N. Y. 144; *Sceva v. True*, 53 N. H. 627.

enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.¹

Thus in *Patterson v. Prior*,² the plaintiff brought an action for the value of his services against the warden of a prison and a lessee of convicts, claiming that his imprisonment was illegal and void. The action was allowed against the lessee because he had derived a benefit from the services of the plaintiff, but was disallowed as to the warden, for the reason that though he had been a tortfeasor, he had derived no profit in the commission of the wrong. The doctrine of waiver of tort, so far as it involves the doctrine of enrichment is thus ably summed up by Lord Mansfield, in *Hambly v. Trott*:³—

“If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

“So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.”

It is true that you cannot sue in assumpsit a person who commits an assault and battery, while you can sue in assumpsit one who steals your goods and sells them. But it is submitted that the true reason is not that suggested by a learned writer,⁴ that it would be absurd in the one case to assume that the defendant promised to make compensation for the damage done, while in the other case there are facts which would support the implication of a promise. In the one case there is no enrichment, in the other

¹ *Hambly v. Trott*, Cowp. 371 (*semble*); *Powell v. Rees*, 7 A. & E. 426 (*semble*); *Ex parte Adamson*, 8 Ch. Div. 807 (*semble*); *Patterson v. Prior*, 18 Ind. 440; *Tightmyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, 20 Kan. 235; *National Trust Co. v. Gleason*, 77 N. Y. 400; *New York Guaranty Co. v. Gleason*, 78 N. Y. 503.

² 18 Ind. 440.

³ Cowp. 371.

⁴ Cooley on Torts, 108.

there is; hence in the one case your remedy is in tort only, while in the other you can sue in quasi-contract.

It has been held that it is not sufficient for the plaintiff to prove that the defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity.¹

In *Phillips v. Homfray*,² one of the questions raised was whether the plaintiff could recover against the defendant as executor of one who had used plaintiff's underground roadway for the carrying of coal without the plaintiff's consent. The majority of the court (Lords Justices Bowen and Cotton) held that he could not, Baggallay, L. J., dissenting. The following paragraphs, from the opinion of Lord Justice Bowen, give sufficiently the ground of the decision:

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. The mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

"The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads, took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved *his estate expense, but he did not bring into it any additional property or value belonging to another person.*"

¹ *Phillips v. Homfray*, 24 Ch. Div. 439.

² 24 Ch. Div. 439.

It is respectfully submitted that the decision in *Phillips v. Homfray* unnecessarily limits the scope of the doctrine of waiver of tort. While it is true that the theory of restitution requires the existence of minus and plus quantities, it is equally true that enrichment can be negative as well as positive, and that one who saves an expenditure by using the property of another, as in *Phillips v. Homfray*, does thereby enrich himself. From an equitable point of view it would seem that wrongful *user*, and not wrongful deprivation, of another's property, resulting in the enrichment of the tortfeasor, should be the principle underlying the doctrine of waiver of tort. Should not the estate of one who has used, without the consent of the patentee, a patented idea, respond to the patentee to the extent of the tortfeasor's unjust enrichment? Yet it would seem difficult, except on the principle of wrongful user, to reach the estate. The tortfeasor, owing to the nature of the right which he has violated, has not deprived the patentee of his property, or excluded him from the enjoyment thereof. At the same time that the tortfeasor is violating the patentee's right, the latter, and any number of persons with his consent, can use the same. During the commission of the tort he has every right which he had before; namely, the right to the exclusive use of the idea. Except on the principle of wrongful user, it seems impossible, also, to support the right of a carrier to waive the tort and sue for freight where one fraudulently and in violation of the rights of the carrier has his goods carried from one place to another, it not appearing that the presence of the goods has required any additional effort on the part of the carrier, or that it has caused him to lose the carriage of other goods.¹

But it does not follow that the measure of the recovery is to bear any relation to the amount of profit made by the defendant. The plaintiff in a case of this sort should recover such a sum as the jury would have been authorized to give, had there been a contract between the plaintiff and the defendant that the latter should pay the reasonable value of his user. Any question as to incidental or collateral profit made by the tortfeasor — in fact, the entire question of profit — should be excluded. Thus, if A, by the wrongful use of B's roadway, should perform a contract which could not otherwise have been performed, and thereby make a profit of \$10,000, the question in determining the amount of B's recovery would be, not what profit did A make, but what amount

¹ See *Rumsey v. N. E. R. W. Co.*, 32 L. J. C. P. 244.

should he have paid B, had he contracted to pay a reasonable sum for the use of the roadway.¹

There is a class of cases to be carefully distinguished from *Phillips v. Homfray*, in which the plaintiff is undoubtedly allowed to recover, although he in fact shows no damage. In these cases it will be found that the defendant has professed to act on behalf of the plaintiff, and that the plaintiff recovers, by virtue of the doctrine of ratification, on the theory of agency. Waiver of tort is not at all involved. This is made apparent by two illustrations. A, professing to act as agent for B, though really having no authority so to act, collects a debt due from C to B. By the collection of this money, — assuming C not to have been thereby rendered insolvent, — A has done B an injury. B's position is just what it was before; he is a creditor of C, and has a right to collect from him the amount of his debt. A has in truth committed a tort, not towards B, but towards C, who can sue him either in tort, in assumpsit, for a breach of warranty of authority, or in a count for money had and received. Therefore, if B's right of action against A had to be worked out through the doctrine of waiver of tort, B would have none; since as between himself and A there has been no tort committed. But by ratifying A's act, the relation of principal and agent is created, and A becomes liable to B in a count for money had and received.² If, however, we assume that C is indebted to B, and that A, claiming not to act for B, but to be in fact C's creditor, collects the debt, then B has no claim whatever against A, — not on the theory of waiver of tort for the reasons just stated, and not on the theory of ratifying A's act, because there can be no ratification, A not having professed to act for B.³ It would seem that in the case last supposed, B's remedy would be in tort alone, even if it appeared that by the collection of the money, C had been

¹ When the writer first read the decision in *Phillips v. Homfray*, he was of the opinion that the decision was wrong. Subsequently he was inclined to adopt the view of the majority of the court, because of the difficulty of formulating a principle which would not unduly extend the scope of waiver of tort. The principle stated in the text, it is hoped, will be found to meet the difficulties that may be suggested as arising from a departure from the decision.

² *Clarence v. Marshall*, 2 Cr. & M. 495; *Brown v. Brown*, 40 Hun, 418. Conf. *Andrews v. Hawley*, 26 L. J. Ex. 323.

³ *Vaughan v. Matthews*, 13 Q. B. 187; *Hall v. Carpen*, 27 Ill. 386, 29 Ill. 512; *Cecil v. Rose*, 17 Md. 92 (*semble*); *Davis v. Smith*, 29 Minn. 201; *Nolan v. Manton*, 46 N. J. L. 231; *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 450. See, *contra*, *O'Conley v. City of Natchez*, 9 Miss. 31.

made insolvent, and that B had in consequence been unable to realize his debt. For in such a case the property which has been added to A's estate was not B's, but C's, and the right to recover the money or an equivalent sum is in C, and not in B.

The distinction to be drawn between a case where the defendant professes to act for another, and where he claims to be acting in his own right, is well illustrated by *Vaughan v. Matthews*.¹ In that case the plaintiff, as executor, sought to recover from the defendant money which the defendant had collected in the following circumstances: the plaintiff's testatrix had loaned money, taking in exchange a note payable either to "Miss Vaughan" (the testatrix), or to "the Miss Vaughans." The jury were unable to decide in which form the note was made. The plaintiff's testatrix died, leaving a sister, who afterwards died, leaving the defendant her executor. The defendant, the note, when it reached his hands, being in form payable to "the Miss Vaughans," collected the amount thereof. The plaintiff claimed that the note was made payable to his testatrix, and had been fraudulently altered so as to make it purport to be payable to "the Miss Vaughans," and consequently to the defendant's testatrix as survivor. It was held that on these facts the plaintiff was not entitled to recover: not on the theory of following the proceeds of property tortiously taken from the plaintiff or his testatrix, because by the fraudulent alteration the note given to the plaintiff had ceased absolutely to exist, and consequently the money collected by the defendant was not the proceeds of property belonging to the plaintiff; and not on the theory of agency, because the defendant claimed to be acting, not for the plaintiff, but in his own right.

The decision itself in *Vaughan v. Matthews* seems open to criticism. Assuming the note to have been absolutely destroyed and extinguished by the alteration, still the note held by the defendant was the proceeds of the original one. Of this second note the defendant should have been treated as a constructive trustee, and as a consequence the plaintiff should have been allowed to recover the proceeds of the note held on the constructive trust.

As the foregoing principles have not been uniformly applied in all cases where a tortfeasor, by the commission of a tort, has enriched himself, it becomes necessary to consider in detail the

¹ 13 Q. B. 187.

several classes of cases in which the question of waiver of tort has arisen.

When the defendant has converted the plaintiff's property, and in the act of conversion, or thereafter, sells the same, the plaintiff may waive the tort and sue in assumpsit, using the count for money had and received to recover the proceeds of the sale.¹

In *Lamine v. Dorell*,² which is the case most often cited for this proposition, it would seem that the defendant fraudulently procured letters of administration on an estate upon which the plaintiff was entitled to administer, and that, acting under these letters, he sold certain debentures belonging to the estate. The defendant's letters being subsequently revoked, and others being granted to the plaintiff, the latter sued the defendant, in a count for money had and received, to recover the proceeds arising from the sale of the debentures, and was allowed to recover.

The reasoning of the court in this case will appear from the following extracts:—

“*POWELL, J.* When the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reasons of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as for money received to his use.”

And Chief-Justice Holt, speaking of the effect of a recovery in this form of action upon the right to sue in tort, said,—

“This recovery may be given in evidence upon *not guilty* in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.”

Lamine v. Dorell would seem to be a proper case for a true ratification, since the defendant professed to be acting for the estate represented by the plaintiff. But if we deal with it as an ordinary case of waiver of tort, it is evident that the theory of treating the sale as made with the plaintiff's consent is a pure fiction, adopted

¹ *Lamine v. Dorell*, 2 Ld. Ray. 1216; *Oughton v. Seppings*, 1 B. & Ad. 241; *Young v. Marshall*, 8 Bing. 43; *Powell v. Rees*, 7 A. & E. 426; *Thornton v. Strauss*, 79 Ala. 164; *Hudson v. Gilliland*, 25 Ark. 100; *Staat v. Evans*, 35 Ill. 455; *Leighton v. Preston*, 9 Gill, 201; *Gilmore v. Wilbur*, 12 Pick. 120; *Knapp v. Hobbs*, 50 N. H. 476; *Budd v. Hiler*, 3 Dutch. 43; *Comstock v. Hier*, 73 N. Y. 269; *Olive v. Olive*, 95 No. Ca. 485; *Hall v. Peckham*, 8 R. I. 370; *Thompson v. Thompson*, 5 W. Va. 190.

² 2 Ld. Ray. 1216.

to meet the supposed difficulties of the action of assumpsit. This action in its origin, whether brought in the form of special assumpsit or *indebitatus assumpsit*, was intended to give a remedy for a breach of a true contract.¹ That is what is meant by Powell, J., when he says it is hard to turn a tortious act into a contract and against the reasons of assumpsits. It must also be remembered that when this case was decided (1705) the doctrine of waiver of tort was in its infancy. It had been ruled as late as 1675² that in the case of a conversion and sale of goods, an action of assumpsit for money had and received could not be maintained. While it must be admitted that notwithstanding the establishment of the doctrine of waiver of tort, many of the courts, even in jurisdictions where all forms of action have been abolished, continue to use much the same phraseology as that in *Lamine v. Dorell*, still, the preferable form of statement is that employed by Park, J., in *Marsh v. Keating*,³ in the House of Lords:—

“Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her whether the right of the transferee to hold the stock be strengthened or not. She is looking only to the right of recovering the purchase-money. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.”⁴

As the desire to give a remedy in assumpsit begot the fiction, and not the fiction the desire, and as the fiction does not reach all the cases where the doctrine of waiver of tort applies, but must give place, if fictions are to be adopted, to others if possible even more violent, — *e. g.*, when an action is brought in assumpsit against a thief or embezzler to recover money stolen or embezzled, — there is no reason or excuse for continuing the fiction at the present day.

If the act by which the plaintiff has been deprived of his property was never in itself an actionable tort, but simply an incident of another tort, increasing the amount of damages recoverable for

¹ Ames, History of Assumpsit, 2 Harvard Law Review, 53.

² Phillips v. Thompson, 3 Lev. 191.

³ 1 M. & A. 582.

⁴ It is only fair to state that in another part of his opinion the learned judge states in substance the argument of the court in *Lamine v. Dorell*.

the latter, then, notwithstanding the defendant has sold property acquired by his tortious act, an action will not lie to recover the proceeds.¹ Hence a disseisee of land, the disseisor, by the act of disseisin, becoming the owner thereof, cannot maintain an action for money had and received against the disseisor to recover the proceeds arising from the sale of timber.²

As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant,³ it will be fatal to this form of action that the amount is not ascertainable. Hence it has been held 'that where goods placed by the plaintiff with the debtor of defendant were received by the defendant from his debtor on account of the debt, with other goods belonging to the debtor himself, the plaintiff could not recover because of his inability to prove the valuation put upon his goods.'⁴

While in order to support the count for money had and received, the tort being waived, it is not sufficient to prove that the defendant has disposed of the plaintiff's property by way of barter or exchange,⁵ still it is not in all cases necessary to show that he has actually received money itself. If, having a right to receive money, he accepts something in lieu thereof, the transaction will be treated as if he had first received the money, and then had bought with it that which in fact he received in the first instance in place of the money.⁶

On the other hand, though the defendant has sold the goods, if he has not collected the purchase-money, or received its equivalent as just explained, he will not be liable in a count for money had and received. Thus, in *Budd v. Hiler*⁷ the defendant tortiously sold property belonging to the plaintiff, receiving at the time of the sale only a part of the purchase-money, and taking a note for the remainder. The plaintiff sought to charge him in a count for money had and received, with the entire purchase-money; but his recovery was limited to the amount of cash actually received.

¹ *Balch v. Patten*, 45 Me. 41; *Rogers v. Inhabitants of Greenbush*, 57 Me. 441; *Bigelow v. Jones*, 10 Pick. 161.

² *Bigelow v. Jones*, 10 Pick. 161.

³ *Lindon v. Hooper*, Cowp. 414 (*semble*); *Budd v. Hiler*, 3 Dutch. 43.

⁴ *Saville v. Welch*, 58 Jt. 683.

⁵ *Kidney v. Pinous*, 41 Vt. 386.

⁶ *Ainslie v. Wilson*, 7 Cow. 662; *Miller v. Miller*, 7 Pick. 133; *Doon v. Ravey*, 49 Vt. 293.

⁷ 3 Dutch. 43.

Since to maintain an action for money had and received in this class of cases the plaintiff must prove the receipt of money by the defendant as well as a wrongful conversion, his cause of action does not arise until the defendant has received the proceeds of the sale; and therefore the Statute of Limitations begins to run only from that time, and it is no answer to a count for money had and received that since the sale and receipt of the proceeds and before action brought the right to sue in trover has been barred. The period of limitation in such a case is that applicable to actions of assumpsit.¹

In *Dougherty v. Chapman*,² it was held that where a count for money had and received is brought to recover the proceeds arising from the sale of property converted, interest is recoverable only from the time when a demand is made for the proceeds, the action being a sufficient demand. The following extract from the opinion of Hall, J., shows the line of reasoning adopted by the court:—

“The plaintiff’s right to waive the tort and sue in assumpsit for the proceeds of the sale was authorized by an implied promise, raised by law, on the part of the defendant that he would pay the money to the plaintiff. This right of election on the part of the plaintiff rests upon the fiction imposed at his pleasure upon the misconduct of the defendant. By electing to waive the tort, the plaintiff became entitled to the proceeds of the sale; but up to that time he was not entitled to such proceeds. The right to the proceeds accrued by force, and at the moment of election, and not before. As the plaintiff was not entitled to the proceeds of the sale until he made the election, as a matter of course he was not entitled to interest thereon prior thereto.”

This case is certainly inconsistent in principle with the rule laid down in *Miller v. Miller* as to the Statute of Limitations, and in the opinion of the writer is not to be supported. The decision rests entirely upon a proposition which the writer has attempted to show is fallacious;³ namely, that by suing in assumpsit, one in some mysterious way converts that which was until then simply a tort, into a contract. Whereas in truth one has an election of remedies because he has independent rights, and does not acquire rights, as the court here assumes, by electing remedies. If, for example, a man deals with an agent whose agency is not disclosed, — where, upon the doctrines applicable to an undisclosed agency, the party

¹ *Miller v. Miller*, 7 Pick. 133.

² 29 Mo. Ap. 233.

³ See *supra*, p. 223.

with whom the agent deals can elect to hold the undisclosed principal, — no one would say that his right did not accrue until he so elected. But in truth there is no difference in principle: in the case of the undisclosed principal, the alternative rights are acquired by the making of the contract; in the case of property being converted and sold, the right to receive the proceeds arises from the receipt of the money. At that moment of time the tortfeasor has imposed upon him the obligation to deliver the money to the party whose property has been converted. If he is under no such obligation then, and dies before an election is made to sue in *assumpsit* instead of in tort, upon what principle can his executor or administrator be held liable? The representative of the deceased has committed no tort, and confessedly is not liable at common law for the tort of the deceased. How can he be held liable for money had and received, as he clearly is, if no such right existed against the tortfeasor?

Assuming that the Statute of Limitations runs, not from the time of the conversion of the property, but from the time of the receipt of the money arising from the sale, the question arises, Within what time must the money be received? Suppose, for example, that property is sold either at the time of conversion or afterwards, and that the money is not received until after the Statute of Limitations has barred an action for the tort. Can the plaintiff still recover the proceeds? If the sale is not made until the injured party has lost his right to sue for the conversion, the tortfeasor has acquired title, and the sale was a sale of his own property.¹ In such an event, therefore, though the writer knows of no case in point, it would seem clear that the injured party has no right to receive the proceeds. If, however, the title to the property is in the injured party at the time of the sale, it would seem that the running of the statute subsequent thereto, but prior to the receipt of the money by the defendant, should not affect the plaintiff's right. He is equitably entitled to the debt as the proceeds of his property, and hence to the money realized on it. The tortfeasor, so long as a specific *res* exists into which the injured party's property can be traced, is in fact a constructive trustee.

To entitle one to waive the tort and sue for the proceeds arising from the sale of converted property, it has been held to be sufficient if he proves that he had *possession*; it is said that he need not

¹ Ames, *The Disseisin of Chattels*, 3 *Harvard Law Review*, 321, 322.

establish title to the property.¹ This result was deduced from the well-established rule of law that possession is a sufficient basis for the action of trover or trespass. Thus, in *Oughton v. Seppings*,² a widow who sued for the proceeds of personal property sold by the defendant, was allowed to recover, although the defendant proved that the property was purchased in the lifetime of the plaintiff's husband; Lord Tenterden, C. J., saying, —

“There was evidence here, though perhaps slight, that the plaintiff was in possession of the pony. If she was in possession at the time when it was seized, she might clearly have maintained trespass against a wrongdoer; and if she might maintain trespass, she may waive the tort and maintain this action.”

Since one has a right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that where the plaintiff's *money* has been tortiously obtained by the defendant, the tort may be waived and an action for money had and received be brought.³

It is of course no defence to such an action that the money was obtained, not from the plaintiff, but from one to whom the plaintiff intrusted it, and with whom defendant was engaged in an illegal transaction. For in such a case the plaintiff claims in his own right and not through his agent, and therefore the illegality of the transaction is immaterial. Thus, in *Clarke v. Shee*⁴ the plaintiff sued the defendant in a count for money had and received to recover money which had been received by the plaintiff's clerk in the course of the plaintiff's business, and used by the clerk in the purchase of lottery tickets from the defendant in violation of the Lottery Act. It was held that the plaintiff was entitled to recover. Lord Mansfield, delivering the opinion of the court, said, —

“I think the plaintiff does not sue as standing in the place of Wood, his clerk, for the money and notes which Wood paid to the defendants are the identical notes and money of the plaintiff. Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be

¹ *Oughton v. Seppings*, 1 B. & Ad. 241.

² 1 B. & Ad. 241.

³ *Clarke v. Shee*, Cowp. 197; *Catts v. Phalen*, 2 How. 376; *Burton v. Driggs*, 20 Wall. 125; *Jones v. Inness*, 32 Kan. 177; *Cory v. Freeholders*, 47 N. J. L. 181; *People v. Wood*, 121 N. Y. 522; *Webb v. Fulchire*, 3 Ire. (Law) 485; *Heindill v. White*, 34 Vt. 558; *Kiewest v. Rindkopf*, 46 Wis. 481; *Western Assurance Co. v. Towle*, 65 Wis. 247.

⁴ Cowp. 197.

brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

It has also been held to be no defence to an action brought to recover money fraudulently obtained, that the plaintiff supposed the payment of the money to be called for by an illegal contract which he had made with the defendant, if in fact the money was not payable under the contract, but was obtained by the defendant's fraud.¹ In *Catts v. Phalen*,² the plaintiff sued to recover money paid to the defendant in the belief that the latter was entitled to it under a lottery drawing. The defendant, who was employed to draw the tickets from the wheel, in fact obtained the money by concealing in his sleeve a ticket with a number corresponding to the number of the ticket held by him, and pretending to draw the ticket from the wheel. He pleaded the illegality of the lottery. The court, assuming the drawing to be illegal, decided for the plaintiff, Baldwin, J., saying, —

"The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to or drew the prize, it was paid and received on the false assertion of that fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place."

As a condition of recovering money tortiously obtained, the plaintiff, if he has received anything of value from the defendant, must return the same. And since the plaintiff's claim rests upon the fact that the defendant cannot be allowed in good conscience to keep what he has obtained, the measure of the plaintiff's recovery is not the entire amount paid by the plaintiff, but the amount which it is against conscience for the defendant to keep.³ In the *Western Assurance Co. v. Towle*,⁴ the defendant by false and fraudulent overstatements as to the amount of a loss (which

¹ *Catts v. Phalen*, 2 How. 376; *Northwestern Ins. Co. v. Elliott*, 7 Sawyer, 17; *Webb v. Fulchire*, 3 Ire. (Law) 485; *Kiewest v. Rindkopf*, 46 Wis. 481.

² 2 How. 376.

³ *Lindon v. Hooper*, Cowp. 414 (*semble*); *The Western Assurance Co. v. Towle*, 65 Wis. 247.

⁴ 65 Wis. 247.

had in part been suffered) got from the plaintiff the amount of the policy as for a total loss. There was a clause in the policy declaring forfeiture thereof in such an event. The plaintiff having recovered a verdict for the amount of the policy, it was set aside, the court holding that the recovery should have been limited to the money received over and above the actual loss suffered. Taylor, J., said, —

“ . . . The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid. . . . False swearing and false valuation in proof of loss might have been a good defence to a recovery upon the policy, had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants.”

Since the right to recover money which has been stolen, fraudulently obtained, or wrongfully converted to another's use, rests on the equitable principle of unjust enrichment, the claim may be asserted, not only against the immediate tortfeasor, but against any one into whose possession the money may be traced until it reaches the hands of a purchaser for value without notice.¹ As the claim is, however, maintained on strict equitable principles, it cannot be asserted against a purchaser for value without notice.² Of course payment to the tortfeasor after notice of plaintiff's claim is no answer to the action.³

As the fees incident to an office belong equitably to the rightful claimant, and not to the usurper, the latter is liable for all such fees received.⁴ Since, however, the claimant's right to receive the fees for services actually rendered by another rests upon

¹ *Calland v. Lloyd*, 6 M. & W. 26; *Heilbut v. Nevill*, L. R. 5 C. P. 478; *Bayne v. United States*, 93 U. S. 642; *United States Bank v. State Bank*, 96 U. S. 30; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Causidere v. Beers*, 1 Abb. Ap. Dec. 333; *Hindemarch v. Hoffman*, 127 Pa. St. 284.

² *State Bank v. United States Bank*, 114 U. S. 401; *Bank of Charleston v. State Bank*, 13 Rich. Cas. 291.

³ *Hindemarch v. Hoffman*, 127 Pa. St. 284.

⁴ *Howard v. Wood*, 2 Lev. 245; *Arris v. Stukeley*, 2 Mod. 260; *Kessel v. Zeiser*, 102 N. Y. 114.

his ownership of the office, it follows that he can only recover the fees necessarily incident to the office. Consequently mere gratuities received by the usurper cannot be recovered.¹ In such a case the plaintiff cannot make out his right, since what was given to the defendant might not have been given to the plaintiff. It is true that but for the tort the defendant could not have received the gratuity, but *non constat* that the plaintiff, if the defendant had not committed the tort, would have received it.

Where the defendant entices away the plaintiff's apprentice and induces the latter to work for him, the plaintiff is entitled to recover the value of the services received by the defendant.² The opinion of Mansfield, C. J., in *Lightly v. Clouston*, in which this proposition of law was first announced, was as follows:—

“I should have thought it better for the law to have kept its course; but it has now been long settled that in cases of sale, if the plaintiff chooses to sue for the produce of that sale, he may do it. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice; that he is consequently entitled to an equivalent for that labor, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer that he obtained that labor, not by contract with the master, but by wrong, and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold and the money has found its way into the pocket of the defendant.”

If one is liable to the master for the benefit received from the services of an apprentice whom he has enticed from the service of the master, it would seem necessarily to follow that one who has wrongfully deprived another of his personal property and used it, should be liable in quasi-contract for the benefit derived from the use thereof. Lord Mansfield was clearly of this opinion, — the following illustration, used by him in *Hambly v. Trott*,³ being in point: “So if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor,

¹ *Boyter v. Dodsworth*, 6 T. R. 681.

² *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *James v. Le Roy*, 6 Johns. 274; *Stockett v. Watkins' Adm'rs*, 2 G. & J. 326. See, however, *contra*, *Crow v. Boyd*, 17 Ala. 51.

³ 5 Cowp. 377.

though it would against him; but an action for the use and hire of the horse will lie against the executor."

It has accordingly been held that the action will lie to recover the value of personal property wrongfully taken and used.¹ The right has also been denied in at least two cases.² The decision in *Carson v. River Lumbering Co.* is however much weakened by the quasi-admission of the court that if the tortfeasor were dead, the action would be allowed against his executor or administrator. But if not against him, why against his representative, since the tortfeasor, and not the representative, is the one who did the wrong and derived the benefit? If it be answered that the remedy in tort against the tortfeasor is adequate, it may be replied that the whole doctrine of waiver of tort exists notwithstanding the existence of the remedy in tort. Likewise, the argument by which the plaintiff was defeated in *Wynne v. Latham* could be used to defeat every plaintiff proceeding on the theory of waiver of tort. In that case Ruffin, J., said: "Most actions will only lie on a contract express or implied, and the contract here is supposed to be one of the latter kind. But the law cannot imply a contract between these parties when it is clear from the facts stated that the defendants derived their possession and title from another person, under whom they claimed the slaves adversely to the plaintiff and all the world." This is of course treating a fiction as if it were a fact, and applying it, not to further the ends for which it was adopted, but to defeat them.

One who has been dispossessed of his land should logically be allowed to sue the wrongful occupant in a count for use and occupation, to recover its rental value; but it is not permitted.³ The failure to extend the doctrine to this class of cases is due to purely historical reasons. Where the tort was waived at common law, and an action brought to enforce the quasi-contractual obligation, the form of action used was the *indebitatus assumpsit* counts. But it was a cardinal principle of the common law that in bringing an action a

¹ *Fanson v. Linsley*, 20 Kan. 235; *Philadelphia Co. v. Park Brothers*, 138 Pa. St. 346.

² *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249; *Wynne v. Latham*, 6 Jones L. 329. See *Phillips v. Homfray*, 24 Ch. Div. at p. 460.

³ *Tew v. Jones*, 13 M. & W. 12; *Stringfellow v. Curry*, 76 Ala. 394; *Stockett v. Walker*, 2 G. & J. 326; *Central Mills Co. v. Hart*, 124 Mass. 123; *Lockwood v. Thunder Bay Co.*, 42 Mich. 536; *Henderson v. Detroit*, 61 Mich. 378; *Crosby v. Horne Co.*, 45 Minn. 249; *Aull Savings Bank v. Aull*, 80 Mo. 199; *Dixon v. Ahern*, 19 Nev. 422; *Preston v. Hawley*, 101 N. Y. 586; *Collyer v. Collyer*, 113 N. Y. 442.

plaintiff must pursue his highest remedy. Where land was leased and rent reserved, the remedy given by the common law was debt; and that being regarded as a higher remedy than *indebitatus assumpsit*, the rent could not be recovered in an *indebitatus assumpsit* count. It would have been extraordinary had the courts given a remedy against a tortfeasor which they did not allow on a contract against a tenant. And although by statute the scope of *indebitatus assumpsit* has been extended to cases where the relation of landlord and tenant exists, the courts have not permitted its use in the absence of a true contract between the parties; and even in jurisdictions where all forms of action are abolished, this doctrine, originating in a distinction drawn between different forms of action, is perpetuated.¹ As *assumpsit* will not lie for a wrongful use and occupation, of course the rent received by such an occupant cannot be recovered in a count for money had and received.²

The question of waiving the tort has arisen in a class of cases suggested by, and yet differing from, those in which the defendant has wrongfully used the plaintiff's personal property; namely, where the defendant has converted the property, but, instead of selling, either keeps it or has consumed it. Here the decisions are in conflict. In *Russell v. Bell*,³ the plaintiff, as assignee of a bankrupt, sought to recover against the defendant, in a count *for goods sold and delivered*, the value of goods delivered to the defendant by the bankrupt after he had committed an act of bankruptcy. A motion by the defendant's counsel to enter a nonsuit, on the ground that the plaintiff had failed to prove a contract of sale, was denied. Alderson, B., thought the evidence warranted the finding of such a contract. Lord Abinger thought that it was not necessary for the plaintiff to prove a contract in order to recover in the count for goods sold and delivered; saying, —

“Mr. Crompton says that if you treat this as a sale, you must treat it as a sale with all the circumstances belonging to it. That proposition is true, with this qualification, — if the sale is made by an agent, and properly conducted for the supposed vendor, and the person buying is an honest buyer, the vendor must stand to the sale, and is bound by the

¹ See cases *supra*, note 1. The reader who may be interested in studying the history of this doctrine is referred to a very lucid and most instructive article by Professor Ames on “*Assumpsit for Use and Occupation*” in 2 *Harvard Law Review*, 377.

² *Clarence v. Marshall*, 2 C. & M. 495; *Lockard v. Barton*, 78 Ala. 189; *King v. Mason*, 42 Ill. 223.

³ 10 M. & W. 340.

contract; but if a stranger takes my goods, and delivers them to another man, no doubt a contract may be implied, and I may bring an action either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. When a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit, — that is the solution of it, — and gets rid of the whole difficulty.¹ Here the bankrupt took these goods and delivered them to the defendants; on that an implied assumpsit arises that they are to pay the owners the value of the goods."

Gurney, B., concurred in the decision of the court, but gave no opinion. On this question the authorities in America are pretty evenly divided.²

In *Jones v. Hoar*³ — the leading case in this country denying the right of waiver of tort under such circumstances — the court seemed to proceed on the short ground that they could not without greatly extending the doctrine of waiver of tort beyond any of the decided cases apply to the count for goods sold and delivered the principles which had been applied to the count for money had and received. As against the tortfeasor himself, they were not willing to take this step; though they left open the question as to whether such an action might not be brought against his executor or administrator. But as the writer has had occasion to remark, how can such an action be maintained against the representative, if not against the tortfeasor? It is the latter, and not the former, who committed the tort, and has directly profited by it. If the action is denied against the tortfeasor because of his liability in tort, then the court, to be consistent, should reach the same result in all cases where the defendant can be sued in tort. If one

¹ The italics are the writer's.

² The action has been allowed in the following States: *California*, *Lehmann v. Schmidt*, 87 Cal. 15; *Georgia*, *Newton Manuf. Co. v. White*, 53 Ga. 395; *Illinois*, *T. W. W. R. R. Co. v. Chew*, 67 Ill. 378; *Indiana*, *Morford v. White*, 53 Ind. 547; *Kansas*, *Fanson v. Linsley*, 20 Kan. 235; *Michigan*, *Aldine Manuf. Co. v. Barnard*, 84 Mich. 632; *Mississippi*, *Evans v. Miller*, 58 Miss. 120; *New York*, *Goodwin v. Griffis*, 88 N. Y. 629; *North Carolina*, *Logan v. Wallis*, 76 No. Ca. 416; *Tennessee*, *Kirkman v. Phillips*, 7 Heisk. 222; *Texas*, *Ferrill v. Mooney*, 33 Tex. 219; *West Virginia*, *McDonald v. Peacemaker*, 5 W. Va. 439; *Wisconsin*, *Walker v. Duncan*, 68 Wis. 624.

The action has been disallowed in the following States: *Alabama*, *Strother v. Butler*, 17 Ala. 733; *Arkansas*, *Bowman v. Browning*, 17 Ark. 599; *Delaware*, *Hutton v. Wetherald*, 5 Harr. 38; *Maine*, *Androscoggin Co. v. Metcalf*, 65 Me. 40; *Massachusetts*, *Jones v. Hoar*, 5 Pick. 285; *Missouri*, *Sandeen v. Kansas City R. R. Co.*, 79 Mo. 278; *New Hampshire*, *Smith v. Smith*, 43 N. H. 536; *Pennsylvania*, *Bethlehem Borough v. Perseverance Fire Ins. Co.*, 81 Pa. St. 445; *South Carolina*, *Schweizer v. Weiber*, 6 Rich. L. 159; *Vermont*, *Winchell v. Noyes*, 23 Vt. 303.

³ 5 Pick. 285.

can sue a tort feasor to recover, not the actual money which he has taken from the plaintiff by fraud or force, but its value, that is, an equivalent sum, or to recover the value of services of which the defendant tortiously deprived the plaintiff to his own benefit, then why not allow an action to recover the value of goods which he has tortiously taken? That you are suing in a count *for goods sold and delivered*, whereas in fact there is no sale, but a tort, is an objection no more insurmountable in this case than when the same count is used to charge a lunatic for necessities furnished to him by one who knew him to be insane. In the latter instance there is no contract of sale, because the lunatic cannot contract; and yet, as he has received the plaintiff's goods under circumstances which render it inequitable for him to keep them without making compensation, the plaintiff is allowed to recover their value.¹ If, then, the count can be successfully used in a case where there is no contract of sale because the defendant is incapable of assenting to one, why can it not be used where there is no assent because the defendant is a tort feasor? In truth, the two cases have a common element, which is universally recognized in the one, and should be in the other, as furnishing a ground for recovery; namely, that the defendant has that for which in conscience he should give the plaintiff an equivalent in money. The objection arising out of the form of action should, of course, have no force in jurisdictions where all forms of action have been abolished. It is not to be supposed that the estate of the tort feasor would not be required, when the tort feasor has taken and consumed the plaintiff's goods, to make good their value to the plaintiff; and yet every argument that can be urged against the tort feasor can be urged against allowing it against his representatives, except the argument that an adequate remedy exists in the first case, but not in the second. And this argument, applying with no more force here than elsewhere, has been generally ignored in the law of quasi-contract.²

¹ *In re Rhodes*, 44 Ch. Div. 94; *Sceva v. True*, 53 N. H. 627.

² Whether a plaintiff has a right to waive the tort in a case of this kind, is of great importance in jurisdictions where the Statute of Limitations prescribes a shorter period of time within which actions in tort must be brought than that prescribed for the bringing of actions in assumpsit or contract. Thus, in *Kirkman v. Phillips*, 7 Heisk. 222, where the plaintiff sued for the value of goods converted by the defendant, the latter pleaded that three years — the time allowed by the Tennessee statute for actions of tort — had elapsed. This plea was held bad, the action sounding, not in tort, but in quasi-contract. "It is true," said the court, "as argued, that the wrongdoer may obtain a title to the property by three years' adverse possession, and yet be liable, for

If the plaintiff can trace goods into the possession of the defendant which were procured from the former under a contract made with a third person, the contract being induced by fraud in which the defendant co-operated, it would necessarily result, if the principle contended for in the preceding paragraph be granted, that the plaintiff can waive the tort and sue for goods sold and delivered, the fraud entitling him to rescind the contract under which he parted with the goods. And such is the law.¹ In *Hill v. Perrott*,² where this point was first decided, the plaintiff sold goods to one Dacosta, who was to pay for them by a six months bill of exchange, to be accepted by the defendant and indorsed by Dacosta. The plaintiff, discovering the transaction to be a swindling scheme to enable Dacosta to pay a debt which he owed to the defendant, and finding the goods in the defendant's possession, sued in assumpsit, the declaration containing two counts, — one for goods sold, and one in special assumpsit. He recovered judgment on the count for goods sold.

In *Ferguson v. Carrington*,³ the plaintiff sued for goods sold and delivered. It appeared that the time of credit given when the goods were sold by the plaintiff to the defendant had not expired. It was objected that the action was prematurely brought; but the plaintiff contended that as the sale was induced by the fraud of the defendant, he might waive the tort and sue in assumpsit. The plaintiff was nonsuited, and a rule for a new trial was refused; the court holding that by bringing that form of action he had affirmed the contract, and so was bound by its terms, including the time of credit.

Parke, J., whose opinion represents that of the other judges, expressed himself as follows:—

“As long as a contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action they affirm the contract made between them and the defendant.”

three years after his title is perfected, to pay the original owner the value thereof. This is a necessary consequence of the right, which the original owner has, to elect whether he will sue for property or its value. During six years his right for the value is as perfect as his right to sue for the property within three years. This right is not interfered with by the Provisions of the Code abolishing the distinctions in the form of actions. The Statute of Limitations applicable to the cause depends upon the nature and character of the action, and not upon its form.”

¹ *Hill v. Perrott*, 3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369; *Danings v. Freeman*, 13 Me. 90; *Isaacs v. Herman*, 49 Miss. 449.

² 3 Taunt. 274.

³ 9 B. & C. 59.

Now, with all deference to so eminent an authority, it is submitted that this decision cannot be supported. To do so, one must say that the count for goods sold and delivered can only be used to enforce a genuine contract obligation. But this view is not sustained by either the English or American courts.¹ If the count can be used where there has been no contractual relation, it must follow that a plaintiff does not in using the count necessarily allege the existence of a contract. If he does not, then, in a case where he has a right to disregard the contract and sue in tort, why cannot he waive the tort and sue in assumpsit for goods sold and delivered, without affirming a contract which was in fact made, but which he has a right to rescind? The result of the English authorities, if Lord Abinger's statement in *Russell v. Bell*² is to be regarded as law, is to leave the law in an anomalous state. As against a tortfeasor whose tort consists in getting your goods by means of a fraudulent contract, you cannot waive the tort and sue in assumpsit for goods sold and delivered; but you may bring a count for goods sold and delivered against a person whose tort consists in procuring your goods otherwise than by a fraudulent contract.

Ferguson v. Carrington has been followed in Massachusetts.³ Although it was followed in an early case in Michigan,⁴ this decision can no longer be regarded as law, it having since been decided in the same State⁵ that this count can be used for a taking and retention where there has been no contract whatever. In Kentucky,⁶ in New York,⁷ and in Georgia,⁸ a recovery is allowed in cases like *Ferguson v. Carrington*.

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(To be continued.)

¹ See above, *passim*.

² *Supra*, p. 239.

³ *Allen v. Ford*, 19 Pick. 217.

⁴ *Galloway v. Holmes*, 1 Doug. 330.

⁵ See *supra*, p. 240, n. 2.

⁶ *Dietz's Assignee v. Sutcliffe*, 80 Ky. 650.

⁷ *Wilson v. Foree*, 6 Johns. 110; *Weigand v. Sichel*, 4 Abb. Ap. Dec. 592. The reason given by the court in *Wilson v. Foree*, 6 Johns. 110, is as follows: "The basis of every contract is good faith. If the special contract be void on the ground of fraud, the plaintiff may disregard it, and bring assumpsit for the goods sold." Substituting the word "voidable" for "void," this is a concise and accurate statement of the reasoning by which the result can be reached, and is in striking contrast with the fanciful statements found in the opinion of the court in *Weigand v. Sichel*, 4 Abb. Ap. 592.

⁸ *Blalock v. Phillips*, 38 Ga. 216.